

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

LAURIE M. KOOIMAN,
Plaintiff,
vs.

No. **C01-4066-PAZ**

JO ANNE B. BARNHART, Commissioner of Social Security,
Defendant.

**MEMORANDUM OPINION
AND ORDER**

TABLE OF CONTENTS

I. INTRODUCTION

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

B. Factual Background

1. Introductory facts and Kooiman's daily activities

a. Hearing testimony

b. Other evidence

2. Vocational expert's testimony

3. Kooiman's medical history

4. The ALJ's conclusion

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

IV. ANALYSIS

V. CONCLUSION

I. INTRODUCTION

The plaintiff Laurel M. Kooiman ("Kooiman") appeals the decision by an administrative law judge ("ALJ") denying her Title II disability insurance ("DI") benefits and Title XVI supplemental security income ("SSI") benefits. Kooiman claims she is disabled due to multiple sclerosis and depression. She argues the ALJ erred in three respects: (1) incorrectly relying on the opinions of non-examining physicians, (2) finding the testimony of Kooiman and her husband not to be credible, and (3) relying upon hypotheticals that were not supported by the record and failed to include all of Kooiman's limitations. (Doc. No. 8, unnumbered p. 3)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

Kooiman filed applications for DI and SSI benefits on October 29, 1998, claiming a disability onset date of September 15, 1997. ⁽¹⁾ (R. 17, 101-103, 314-20) The applications were denied initially on March 29, 1999 (R. 71-75, 321-26), and on reconsideration on June 11, 1999 (R. 77-80, 327-31). Kooiman requested a hearing which was held on November 30, 1999, in Sioux City, Iowa, before ALJ Jan E. Dutton. (R. 33-68) Attorney Wil Forker represented Kooiman at the hearing. Kooiman, her husband Arlan Kooiman ("Arlan"), and Vocational Expert ("VE") William Tucker testified at the hearing. On March 14, 2000, the ALJ issued her opinion denying Kooiman's claims for benefits. (R. 14-31) The Appeals Council denied Kooiman's request for review on April 27, 2001 (R. 8-9), making the ALJ's decision the final decision of the Commissioner.

Kooiman filed a timely Complaint in this court on June 25, 2001, seeking judicial review of the Commissioner's ruling. (Doc. No. 1) The parties consented to jurisdiction of this case by a United States Magistrate Judge, and on July 13, 2001, the Honorable Donald E. O'Brien transferred the case to the undersigned for further proceedings and the entry of judgment. (Doc. No. 3)

Kooiman filed a brief in support of her appeal on October 11, 2001 (Doc. No. 8) On November 29, 2001, the Commissioner filed a motion for remand pursuant to sentence four of 42 U.S.C. § 405(g) (Doc. No. 10). The court granted the motion for remand, but did so pursuant to sentence six of the statute, rather than sentence four. (Doc. No. 110) The Commissioner filed a motion for reconsideration, suggesting sentence four remand was appropriate rather than sentence six remand. (Doc. No. 13) After oral argument, the court withdrew its remand order, and directed the Commissioner to file her brief. (Doc. No. 18) On January 18, 2002, the Commissioner filed her brief resisting Kooiman's appeal. (Doc. No. 19) The court now deems this matter fully submitted, and pursuant to 42 U.S.C. § 405(g), turns to a review of Kooiman's claims for benefits.

B. Factual Background

1. Introductory facts and Kooiman's daily activities

a. Hearing testimony

At the time of the hearing, Kooiman was 30 years old, married, and the mother of three children, ages 6, 4 and 2. (R. 37-38) She and her husband and children lived in Hospers, Iowa, a town of about 1,000

people. (R. 38) Kooiman graduated from college in 1992. (*Id.*)

Kooiman has worked as a social worker, case worker, program aide, apartment manager, day care worker, and waitress. (R. 39) She also worked for awhile at the Dutch Colony Inn, a hotel, where she "sat at the desk and . . . cleaned the rooms," and a variety of other work. (R. 41) After her first child was born, Kooiman worked full-time for a year as a case worker-program manager at Folkhaven, a care home for disabled persons. (R. 39-40) After her second child was born, Kooiman never returned to full-time work outside the home. Rather, she decided to find work she could do at home while staying with her children. She worked as an apartment manager for two and one-half years, trading her services for free rent. She also did some day care, watching one child in her apartment. She quit the management job when she and her husband bought a home, in the summer of 1993. (R. 41-42)

After moving into her home in Hospers, Kooiman worked as a day care provider, watching children in her home, until she was diagnosed with multiple sclerosis ("MS") in September 1997. (R. 40-41) She also did social work one morning per week at Pleasant Acres in Hull, Iowa, which is about 30 miles from Kooiman's home. She still had that job as of the time of the hearing. Kooiman was having family members drive her to the job because her license was revoked after she had a seizure. (R. 42-43) At the time of the hearing, she had been seizure-free for six months, and had scheduled a physical examination for December 10, 1999, to get her driver's license back. (R. 42-43)

About two weeks before Kooiman was diagnosed with MS, she called the families whose children she was watching and ended the day care service, telling them, "I can't babysit, something is going on with me." Since then, she has only been caring for her three children, and working one morning a week at the nursing home. (R. 44, 45) She can pick which morning she works, and the hours are very flexible. When she works, she spends time visiting with five or six residents about how they are doing physically, whether they have any complaints about their care, and the like. Then she does paperwork for 15 to 20 minutes. (R. 51-52) When she goes home after working, she rests more than she does on days when she does not work. She takes a nap and "than just basically [takes] it kind of easy the rest of the day." (R. 52-53)

Kooiman said the doctors who know the most about her MS are Dr. Freeman and Dr. Laird. When the ALJ pointed out that Dr. Laird has declined to comment about the MS aspect of Kooiman's case, Kooiman replied, "I think what I have heard, predominantly, from my doctors, is you know your own body, and you know what you can and can not handle, and that's where they leave it with me." (R. 44) Kooiman explained why she feels she cannot return to work either full-time, or at least for more hours:

It has been my experience that whenever my physical activity or mental stress is increased, my symptoms get worse, and things just get progressively worse for me. I feel I need a daily nap, if I don't get that for extended periods, days at a time, I can tell that my symptoms go up, and it just leads into a full blown attack.

(R. 45)

Kooiman stated she has symptoms every day. "[A]t the least, at the end of the day, my feet are tingly, at the worst, you know, my legs are very numb, and I'm having trouble with my eyes, my eyes, don't focus, and that's like a full blown attack." (R. 45-46) She explained a "full blown attack" involves many different symptoms occurring at the same time. The symptoms include jerky eye movements and

difficulty focusing, fatigue, difficulty walking and handling items, physical and mental weakness, difficulty concentrating and reading, tingling in her feet, leg twitches, achiness in her hands in the morning, and some clumsiness. (R. 46-50) She sometimes is sensitive to light, and wears sunglasses in the house on occasion. (R. 59)

Kooiman's husband, Arlan, works full-time as a supervisor at Quick to Fix Foods in Sioux Center, Iowa. He is gone from home for about nine hours a day, including driving to and from work. (R. 45) Kooiman said her symptoms worsen as her activity level increases. On weekends, when her husband is home, Kooiman might go shopping, or engage in family or church activities, and that will make her symptoms worse. (R. 50-51) Stress also will exacerbate her symptoms. (R. 54) She frequently takes a nap or goes to bed for the night when her husband gets home from work. (R. 58)

Kooiman takes Avonex⁽²⁾ injections once per week to lessen her symptoms. The day she has the injection, she usually has a headache and achiness. The headache lasts most of the day. (R. 53-54) She has bladder infections and trouble urinating, which she stated is typical for someone with MS. (R. 54) She has increased muscle weakness and less stamina since the onset of her illness, and she is very susceptible to temperature changes, especially heat. If she is on her feet for a couple of hours, she will have more tingling in her feet. (R. 55) Kooiman said some days are worse than others. On a day when she experiences medium symptoms, she will have general physical weakness. (R. 56)

Kooiman is being treated for depression and anxiety by Dr. Stanley. She takes Zoloft, which helps her "make it more manageable." (R. 56-57) She has had problems with depression since she was in college. (R. 57)

Some of the household duties have become a problem since the onset of Kooiman's illness. She has difficulty mopping, climbing stairs, vacuuming, and lifting and carrying objects like laundry. (R. 58-59) She tries to avoid those types of activities because she will be very sore the next day. (R. 59) She and her family lived in a two-story house when she was diagnosed, and they have moved to a one-level home to make it easier for her to get around. (R. 58)

Kooiman's hands and feet ache during the night and in the morning. The achiness usually gets better as the day goes on. She will have more aching if she was active the day before; reducing her activity level reduces the aches and pains. (R. 60) Sitting does not seem to bother her, although she has problems with her legs if she is in the car for a long period of time. (*Id.*)

Arlan testified he has noticed the deterioration of Kooiman's condition. As an example, he stated the two of them raked leaves the previous Saturday for about an hour, and his wife "was wiped out for at least a week after that." (R. 61)

b. Other evidence

Kooiman completed a Supplemental Disability Report on November 20, 1998, in which she described her daily activities (R. 143-46), and a Personal Pain/Fatigue Questionnaire on November 21, 1998 (R. 147-150). She stated she does very little housework. She washes dishes in the morning, and she does the laundry, which her husband helps fold and put away. She does very little house cleaning, stating that when she does, she regrets it the next day because of the pain and stiffness she experiences. (R. 143) She does no yard work at all. She drives a car twice a day, when she takes her son to and from school, but

she does not run other errands without someone accompanying her. (R. 144) She has frequent trouble sleeping, and takes a two-hour nap every day. Her mother handles her family finances to alleviate stress on Kooiman and her husband. (*Id.*) Kooiman stated her illness has caused "a huge financial strain" on her family because of her inability to work full-time. (R. 145)

Kooiman described the location, severity, and nature of her pain as follows:

Aching pains in the upper part of my legs - buttocks area. Especially after any degree of physical activity: mopping, sexual activity, walking any long distances. Any long day of activities 8-10 hr. day can create this pain in my upper legs (achiness). I also have pain (sharp) in my hands and feet in the morning - usually lasting 1/2 - 1 hr. in the morning. (At some points at its worse [sic] all day long), pain - stiffness in my neck.

(R. 147, 146) Kooiman indicated a lot of physical activity will make her pain/fatigue worse, including cleaning the house, doing a lot of walking, or missing her mid-day nap. When she mops the floor, the pain in her legs will last for two to three days before subsiding. (R. 147) She experiences pain and fatigue three to four times per week, depending on her level of physical activity. Her pain is usually worse in the morning. (*Id.*) However, her fatigue has improved somewhat since she began taking Avonex. (R. 148)

Kooiman's ability to think and concentrate has been affected by her pain and fatigue. She stated, "During the day I have times when I have a difficult time focusing on one activity. Everything that I have to do seems overwhelming and I run from one activity to the other. Sometimes it's difficult to concentrate when I am reading." (R. 149)

Kooiman described her typical day as follows:

Usually wake up around 6:45 am. My husband leaves for work at 7:00 am. He usually helps me get the kids dressed and ready for the day. My husband also helps get breakfast ready for all the kids before he leaves.

After he leaves for work, I bring my oldest son to school (about 1 mile away). Then my 2 youngest children return home with me. I usually clean up breakfast and then usually go and sit down on the couch with my kids. Around 11:00 am I start preparing a[n] easy meal. (Hotdogs, peanut butter sandwichs [sic] etc.) After lunch - we all go down for a nap from 12 noon to 2 pm. At 3:15 we pick up my oldest from school again. I will give them a snack and sit with them in the living room and look through Zack's papers. While I am out I usually get my mail at the post office (PO Box #). Then at home I also look through the mail. By the time my husband comes home (5:00 pm), I'm ready to lay down on the couch. Arlan will typically make supper and clean up for me. Layed [sic] back activities after supper: reading to kids, watching t.v., listening to music. 8:30 bedtime.

(R. 150)

Kooiman completed a Reconsideration Disability Report on April 22, 1999 (R. 151-54), in which she described how her illness had changed since October 1998:

Have noticed more symptoms the last couple weeks, increase in parasthesia [sic] (feelings of pins/needles) in my feet and hands. Also, an increase in fatigue. Noticed an increase in stiffness in feet and hands. From the date that [the claim] was filed (10/29/98) in early January, 1999, my symptoms became worse, decided to see neurologist/physician to start IV steroid therapy (Orange City).

I have physical limitations in how much activity/walking/ standing in a day. I notice an increase in the parasthesia [sic] in my feet and legs. Also, the next day, I will notice a lot of stiffness and pain (in legs/feet). I know that extra stress in my day also brings on more symptoms as I described above (mental limitations).

(R. 151) She reported she was undergoing IV steroid therapy with Solumedrol (methylprednisolone sodium succinate powder) at Orange City Hospital "to relieve inflammation & expedite the healing cycle." (R. 152) Kooiman also opined:

I believe MS has affected my ability to care for my personal needs in my inability physically to be gainfully employed inside or outside of the home. I know to be true that a long day of physical and/or mental activit[i]es and/or stress leads to a[n] increase in problematic symptoms (fatigue, stiffness and parasthesia [sic]).

(R. 153) She reported she had been receiving extra help from family and friends in caring for her three children since her symptoms had worsened in January 1999. (*Id.*)

Kooiman completed a second Personal Pain/Fatigue Report on May 4, 1999. She continued to report ongoing pain in her feet and hands, and she had begun to have sharp pain in her head after her dosage of Avonex. The headache usually lasts throughout most of the next day. (R. 158) She now experiences pain daily, especially in the late afternoon and evening, and daily achiness in her feet and hands. Her back and neck are sore three to four times per week. Her overall pain and fatigue is worse from 4:00 to 7:00 p.m., with her fatigue subsiding by the next morning. The pain in her neck, hands and feet will improve "after someone rubs them and stay off my feet." (*Id.*)

Kooiman reported, "Probably the worst pain I experience is right in the morning or after my afternoon nap. (feet and hands become very achy) But also in the later afternoon. . . . Pain (achiness) is located in the specific area of my hands and feet. . . . doesn't really radiate anywhere else. Pain in neck does radiate down back and sometimes legs." (*Id.*)

Kooiman stated the Avonex treatment helps her manage the fatigue, but she tends to tire easily, and physically she is not able to do things she used to do. (R. 159) She continues to nap every afternoon. She has problems with eye strain and fatigue when she reads, and occasional problems with hand dexterity, grip strength, and stiffness after writing. She noted her appetite has improved since she began steroid therapy. (R. 160) When she gets "really tired," she "can sometimes trip or loose [sic] balance." (R. 161) She is bothered by sitting on hard surfaces, and she has suffered some "dizzy spells." (*Id.*)

At the time of this second pain/fatigue questionnaire, Kooiman described her typical day as follows:

Wake up with children. My husband helps to dress the kids and get them ready for their day. Bring my oldest son to school. Usually at this point I lay down for 15-20 min. Kids watch some favorite shows on Nick. After lunch - nap with my two/younger children 1 1/2 - 2 hrs. I do dishes sometime in the afternoon. Lay out something for supper. Arlan comes home - takes care of the food prep, also does dishes. I usually by 4-7 I need to lay down.

(R. 161)

2. Vocational expert's testimony

The ALJ posed the following hypothetical question to the VE:

I'd like to ask you some questions about [Kooiman's] ability to go back to past work, [and] if that's not feasible, to do other types of work in the broad world of work. If [Kooiman] needs to have a sedentary job, and by this I mean one where lifting or carrying would be no more than 10 pounds on an occasional or frequent basis, where she would primarily be sitting during the day, could sit for 6 hours out of an 8 hour day, could stand or walk for 2 hours out of an 8 hour day, with no limitation of postural activities or pushing or pulling, no limitation in communication, manipulation, vision, or environmental, would she be able to return to her, any of her past jobs[?]

(R. 65-66) The VE responded that Kooiman's work as a social worker and case worker "is by definition sedentary in nature," and Kooiman should be able to return to that work based on the above hypothetical. (R. 66) The VE excluded four of Kooiman's previous jobs, including waitress, daycare worker, apartment manager, and program aide. (*Id.*) Considering Kooiman's functional capacity, the VE opined Kooiman could perform the full range of unskilled work, and she also had some transferrable skills to some semi-skilled sedentary work. (*Id.*)

The VE then asked whether Kooiman could go back to her past jobs or perform unskilled or semi-skilled sedentary work, if Kooiman's testimony were considered to be credible. The VE replied Kooiman would "have difficulty doing it on any kind of full time basis." (*Id.*) He noted:

[Kooiman] cites fatigue, weakness, the need to nap daily, she has good days/bad days. I don't know that we defined that very well, but it looked like there would, by implication there would be absenteeism, at a fairly high level, and I'm not entirely sure of the implications of the depression, but there's a number of things there that would cause me to think that probably she could not perform those jobs on a full time basis.

(R. 66-67)

3. Kooiman's medical history

A detailed chronology of Kooiman's relevant medical records is attached to this opinion as Appendix A, and the court will only briefly summarize that evidence here. The record indicates Kooiman was diagnosed with MS in September 1997. Although doctors at first were uncertain as to the type of MS Kooiman has, they ultimately determined she suffers from relapsing/remitting MS, rather than chronic/progressive MS. Kooiman has done relatively well on medication, without developing any significant, ongoing neurologic deficits. However, she has suffered one seizure episode, and she suffers from ongoing fatigue, and intermittent numbness, tingling, and stiffness in her hands and feet. In January 1999, Kooiman suffered an exacerbation of her symptoms that required a three-day course of intravenous steroids. She responded well to the treatment.

Kooiman also suffers from depression. From the record, it appears she had mild depression prior to her diagnosis, but her MS diagnosis definitely has contributed to and exacerbated her symptoms. She has responded well to medication and therapy, but various stressors in her life cause worsening of her symptoms. For example, Kooiman has three children to care for; her illness has caused a financial strain on her family; she has a loss of libido that has resulted in some marital difficulties; and she worries a lot about her prognosis and the possibility of increased physical and mental problems arising from her disease.

The various medical opinions of record indicate Kooiman is not significantly limited in her activities of daily living, as long as she has time to rest during the day. The record does suggest, however, that Kooiman likely would be limited in her ability to maintain full-time employment, both due to her mental state and her chronic fatigue.

4. The ALJ's conclusion

The ALJ found Kooiman to have a severe impairment resulting from her MS, but her impairment did not meet or equal the criteria of any of the impairments listed in the Regulations. The ALJ found Kooiman's statements concerning her impairment and its impact on her ability to work not to be entirely credible. Among other things, the ALJ noted Kooiman filed for benefits immediately upon being diagnosed with MS, at the suggestion of a caseworker rather than a medical professional. The ALJ pointed to the fact that Kooiman chose to leave full-time employment after the birth of her children to stay at home with them, and had turned to in-home daycare for income. The ALJ noted, "While a mother's decision to remain home with her young children is understandable, it does weigh against [Kooiman's] credibility regarding complete disability and motivation to work outside the home." (R. 21-22) The ALJ also discounted the testimony of Kooiman's husband, noting he was not in a position to be an "independent witness." (R. 22)

The ALJ found Kooiman could lift up to 20 pounds occasionally or 10 pounds frequently, and she could stand and/or walk up to two hours in an eight-hour workday. (R. 27) She found Kooiman's "past relevant work as a social worker or caseworker did not require the performance of work functions precluded by her medically determinable impairment[,] . . . [and her] impairment does not prevent her from performing her past relevant work." (*Id.*) Therefore, the ALJ found Kooiman was not disabled, and denied her claim for benefits. (*Id.*)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do his previous work but cannot, considering . . . his age, education and work experience, engage in any other kind of substantial gainful work which exists in [significant numbers in] the national economy . . . either in the region in which such individual lives or in several regions of the country." 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *see Kelley*, 133 F.3d at 587-88 (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity. Second, he looks to see whether the claimant labors under a severe impairment; *i.e.*, "one that significantly limits the claimant's physical or mental ability to perform basic work activities." *Kelley*, 133 F.3d at 587-88. Third, if the claimant does have such an impairment, then the Commissioner must decide whether this impairment meets or equals one of the presumptively disabling impairments listed in the regulations. If the impairment does qualify as a presumptively disabling one, then the claimant is considered disabled, regardless of age, education, or work experience. Fourth, the Commissioner must examine whether the claimant retains the residual functional capacity to perform past relevant work.

Finally, if the claimant demonstrates the inability to perform past relevant work, then the burden shifts to the Commissioner to prove there are other jobs in the national economy that the claimant can perform, given the claimant's impairments and vocational factors such as age, education and work experience. *Id.*; *Hunt v. Heckler*, 748 F.2d 478, 479-80 (8th Cir. 1984) ("[O]nce the claimant has shown a disability that prevents him from returning to his previous line of work, the burden shifts to the ALJ to show that there is other work in the national economy that he could perform.") (citing *Baugus v. Secretary of Health & Human Serv.*, 717 F.2d 443, 445-46 (8th Cir. 1983); *Nettles v. Schweiker*, 714 F.2d 833, 835-36 (8th Cir. 1983); *O'Leary v. Schweiker*, 710 F.2d 1334, 1337 (8th Cir. 1983)).

Step five requires that the Commissioner bear the burden on two particular matters:

In our circuit it is well settled law that once a claimant demonstrates that he or she is unable to do past relevant work, the burden of proof shifts to the Commissioner to prove, first that the claimant retains the residual functional capacity to do other kinds of work, and, second that other work exists in substantial numbers in the national economy that the claimant is able to do. *McCoy v. Schweiker*, 683 F.2d 1138, 1146-47 (8th Cir. 1982) (*en banc*); *O'Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983).

Nevland v. Apfel, 204 F.3d 853, 857 (8th Cir. 2000) (emphasis added) *accord Weiler*, 179 F.3d at 1110 (analyzing the fifth-step determination in terms of (1) whether there was sufficient medical evidence to support the ALJ's residual functional capacity determination and (2) whether there was sufficient evidence to support the ALJ's conclusion that there were a significant number of jobs in the economy

that the claimant could perform with that residual functional capacity); *Fenton v. Apfel*, 149 F.3d 907, 910 (8th Cir. 1998) (describing "the Secretary's two-fold burden" at step five to be, first, to prove the claimant has the residual functional capacity to do other kinds of work, and second, to demonstrate that jobs are available in the national economy that are realistically suited to the claimant's qualifications and capabilities).

In the present case, the ALJ found Kooiman had failed to demonstrate she could not return to her past relevant work, and therefore the ALJ stopped the analysis at step four.

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ's findings if they are supported by substantial evidence in the record as a whole. *Weiler v. Apfel*, 179 F.3d 1107, 1109 (8th Cir. 1999) (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . ."). Under this standard, substantial evidence means something "less than a preponderance" of the evidence, *Kelley*, 133 F.3d at 587, but "more than a mere scintilla," *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971); accord *Ellison v. Sullivan*, 921 F.2d 816, 818 (8th Cir. 1990). Substantial evidence is "relevant evidence which a reasonable mind would accept as adequate to support the [ALJ's] conclusion." *Weiler*, 179 F.3d at 1109 (again citing *Pierce*, 173 F.3d at 706); *Perales*, 402 U.S. at 401, 91 S. Ct. at 1427; accord *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993); *Ellison*, 91 F.2d at 818.

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account "whatever in the record fairly detracts from" the weight of the ALJ's decision. *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); accord *Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213). Thus, the review must be "more than an examination of the record for the existence of substantial evidence in support of the Commissioner's decision"; it must "also take into account whatever in the record fairly detracts from the decision." *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Gavin v. Heckler*, 811 F.2d 1195, 1199 (8th Cir. 1987)). The court, however, does "not reweigh the evidence or review the factual record *de novo*." *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (quoting *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992) (citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); see *Hall v. Chater*, 109 F.3d 1255, 1258 (8th Cir. 1997) (citing *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996)). This is true even in cases where the court "might have weighed the evidence differently," *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)), because the court may not reverse "the Commissioner's decision merely because of the existence of substantial evidence supporting a different outcome." *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight.

See, e.g., Young v. Secretary of H.H.S., 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.*, 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). Under *Polaski*:

The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

- 1) the claimant's daily activities;
- 2) the duration, frequency and intensity of the pain;
- 3) precipitating and aggravating factors;
- 4) dosage, effectiveness and side effects of medication;
- 5) functional restrictions.

Polaski, 739 F.2d at 1322.

IV. ANALYSIS

In the Commissioner's motion for sentence four remand, the Commissioner noted the ALJ failed to consider the medical records and opinion of Matthew B. Stanley, D.O., a psychiatrist who has treated Kooiman for depression. In particular, on April 14, 1999, Dr. Stanley noted Kooiman's "M.S. has halted her ability to be employed[.]" (R. 235) The Commissioner seeks a remand with directions for the ALJ to consider Dr. Stanley's opinion.

The court agrees with the Commissioner's position. Although the record as considered by the ALJ contains substantial evidence to support the ALJ's conclusion, that record was not complete. Dr. Stanley's opinion that Kooiman lacks the ability to sustain employment must be considered by the ALJ in making a determination regarding Kooiman's application for benefits.

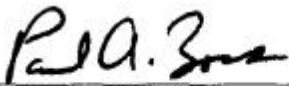
V. CONCLUSION

Accordingly, for the reasons discussed above, the court **grants** the Commissioner's motion for remand (Doc. No. 9), and remands this case pursuant to sentence four of 42 U.S.C. § 405(g), for further proceedings. Upon remand, the ALJ is directed to consider the evidence from Dr. Stanley, to further develop the record as necessary for a complete and accurate finding as to Kooiman's disability, and to render an amended opinion based on the complete record.

Judgment shall be entered in favor of Kooiman and against the Commissioner.

IT IS SO ORDERED.

DATED this 27th day of February, 2002.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

1. Kooiman filed an earlier application for SSI and DI benefits on September 29, 1997, alleging the same disability onset date of September 15, 1997. (R. 303-306) The application was denied (R. 308-312), and no request for reconsideration was filed. (R. 17, 35)
2. Avonex contains Interferon beta-1A, a protein used in the treatment of MS to slow the development of physical disability and decrease the frequency of symptoms. (*See* www.rxlist.com/frame/display.cgi?drug=AVONEX)